APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1371

DONALD C. ALEXANDER,
Commissioner of Internal Revenue, PETITIONER

—v.—

"AMERICANS UNITED" INC., ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 10, 1973
CERTIORARI GRANTED JUNE 4, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1371

DONALD C. ALEXANDER,
Commissioner of Internal Revenue, PETITIONER

—v.—

"AMERICANS UNITED" INC., ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

CIVIL DOCKET

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Number 2260-70

"AMERICANS UNITED" incorporated as PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, GLENN L. ARCHER *and* C. STANLEY LOWELL, suing on behalf of themselves and others similarly situated

vs.

RANDOLPH W. THROWER, as Commissioner of Internal Revenue

Attorneys

Franklin C. Salisbury
919 18th St. N.W.
Room 800

Richard A. Scully
Dept. of Justice

Date	Account	Rec'd	Disb'd	Date	Account	Rec'd
1970						
July 30	Salisbury	10.00				
1971						
Mar. 17	Salisbury	5.00				

DATE	PROCEEDINGS
1970	Deposit for cost by
Jul 30	Complaint, appearance; Affidavit; Exhibit filed

DATE	PROCEEDINGS
1970	
Jul 30	Summons, copies (3 and copies (3) of Complaint issued D.A. ser 7-31; deft. & A.G. ser 8-3-70
Oct 19	Affidavit of James L. Adams to the complaint; exhibit A; c/m 10-14. filed
Oct 23	Stipulation extending time for deft. to answer or otherwise plead to and including 12-1-70 filed
Oct 28	Stipulation filed 10-23-70, approved (N) (Fiat) Pratt, J.
Dec 2	Motion of deft. to dismiss the complaint; P&A; c/m 12-1; M.C.; appearance of Richard A. Scully. filed
Dec 11	Stipulation for extension of time to and including 1-15-71 for pltfs. to respond to motion to dismiss. filed
Dec 14	Stipulation extending time of pltf. to file response to deft's motion to dismiss to 1-15-71 approved. (Fiat) Pratt, J.
Jan 7	Stipulation to extend time for pltf. to respond to motion to dismiss to and including February 15, 1971. filed
Jan 11	Stipulation extending time to respond to motion to dismiss to 2-15-71, granted. (fiat) (N) Pratt, J.
Feb 12	Motion of plfts. for leave to file amended complaint; P&A; exhibits; c/m 2-11-71; M.C. filed
Feb 16	Memorandum of pltf. in opposition to motion to dismiss; c/m 2-12. filed
Mar 3	Motion of pltf. to amend complaint granted
Mar 3	Amended complaint. filed

DATE	PROCEEDINGS
Mar 3	Motion of deft. to dismiss complaint, argued and taken under advisement. (Rep: Phyllis Harper) Pratt, J.
Mar 9	Order denying pltf's motion to convene Three-Judge Court and granting deft's motion to dismiss complaint. (N) Pratt, J.
Mar 17	Notice of appeal by pltf. from order of 3-9; copy mailed to Richard A. Scully, Esq.; $5.00 deposit by Salisbury. filed

[Attachment to original complaint filed July 30, 1970]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.

"AMERICANS UNITED" incorporated as PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, GLENN L. ARCHER *and* C. STANLEY LOWELL, suing on behalf of themselves and others similarly situated, PLAINTIFFS

—against—

RANDOLPH W. THROWER as Commissioner of Internal Revenue, DEFENDANT

COMPLAINT

AFFIDAVIT

STATE OF MARYLAND)
) SS
COUNTY OF MONTGOMERY)

The above-captioned case was filed on July 30th, 1970 in this Court according to belief of your affiants. Your affiants have read newspaper reports, which they verily believe to be true, that the defendant has been using the authority granted in Sections 170 (c) and 501 (c) (3) of the Internal Revenue Code of 1954 as a weapon to prevent groups of persons of like mind from publicly expressing their opinions on matters of political and social interest, including the use of the modern media and the press, so as to influence legislation to redress grievances which arise in contemporary society. The threat and effect of defendant's actions is that your affiants and other persons may not make gifts out of pre-tax income to organizations which advocate causes in such a manner legislation may be influenced.

Your affiants have in the past been able to petition the Government for redress of grievances using as a vehicle "Protestants and Other Americans United for Separation of Church and State" a nonprofit charitable corporation using pre-tax dollars as permitted by Section 170 (c) of the Internal Revenue Code of 1954 until the 501 (c) (3) status of the vehicle corporation was revoked by action of the defendant. Your affiants have read the letter from the District Director of Internal Revenue Service, who is under the direction and control of defendant, addressed to Protestants and Other Americans United for Separation of Church and State, dated April 25, 1969, a copy of which is made a part of this Affidavit. This letter resulted in the loss of 501 (c) (3) status to Americans United and deprivation of affiants' privilege of support of the cause of religious freedom through tax-exempt gifts to Americans United. The letter proves that the Commissioner of Internal Revenue ruled that a substantial part of the activities of Americans United was "carrying on propaganda or otherwise attempting to influence legislation." Your affiants believe that there are organizations which do not believe in the principle of separation of church and state as found in the First Amendment to the United States Constitution and that such organizations are active in petitioning the Government for a redress of their grievance which arise from the application of the constitutional principle of separation of church and state to current church-state problems. These organizations continue to enjoy 501 (c) (3) status and their donors 170 (c) treatment.

Your affiants have thus been deprived of the full use of their money and resources to petition the Government through the vehicle of Americans United for Separation of Church and State, while others of opposing views are not so inhibited by defendant, Randolph W. Thrower.

Your affiants know, from personal knowledge, that many large donors who have in the past used Americans United as a vehicle to express their opinions on church-state relations in the United States and to petition the Government for a redress of their grievances in this field of religious liberty have been restrained from so doing by

the change in status of Americans United. Your affiants have read newspaper reports which they believe to be true that other organizations which express opinions and advocate causes and petition the Government for redress of grievances have similarly been denied their 501 (c) (3) status and their donors denied the 170 (c) advantages arbitrarily and capriciously by the defendant, including organizations which have opinions on conservation of natural resources.

Your affiant believes and claims that defendant's use of 170 (c) and 501 (c) (3) as a device to hamper the free expression of opinion, the advocacy of causes, and the right to petition the Government for redress of grievances, is contrary to the Constitution of the United States as your affiants understand the same and have caused and will do them and others irreparable harm.

/s/ Dr. C. Stanley Lowell

/s/ Dr. Glenn L. Archer
Affiants

SUBSCRIBED AND SWORN BEFORE ME THIS 30th day of July, 1970, by the above named affiants personally.

/s/ Notary Public

My Commission Expires 7/1/74.

US Treasury Department

District Director
Internal Revenue Service

Date: APR 25 1968

REGISTERED MAIL Protestants and Other Americans United for Separation of Church and State
1633 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Gentlemen:

We have reconsidered the ruling dated July 3, 1950 in which you were held exempt from Federal income tax as an organization described in section 101(6) of the Internal Revenue Code of 1939 (corresponding to section 501 (c) (3) of the Internal Revenue Code of 1954).

The available information indicates that you were incorporated in 1948 under the laws of the District of Columbia. The purpose of your organization as stated in its articles of incorporation is to ". . . defend and maintain religious liberty in the United States by the dissemination of knowledge concerning the constitutional principle of separation of church and state. . . ."

In brief, your activities consist of the production, publication, sale and other distribution of your monthly review *Church and State*, films, records, taped speeches, books, booklets, pamphlets, and news releases; operation of a speakers bureau; operation of a legal department; organization of local chapters and study groups; and periodic appearances before legislative bodies and political conventions.

While part of your activities may be classified as "educational" or "charitable" within the meaning of section 501(c)(3) of the Code, you are, nonetheless, an active advocate of a political doctrine. In various publications you have stated your objectives to include: the mobiliza-

tion of public opinion; resisting every attempt by law or the administration of law which widens the breach in the wall of separation of church and state; working for the repeal of any existing state law which sanctions the granting of public aid to church schools; and uniting all "patriotic" citizens in a concerted effort to prevent the passage of any federal law alloting, directly or indirectly, federal education funds to church schools.

The majority of your activities are in furtherance of the objectives stated above. Although a portion of the materials disseminated by you is of a reporting nature, detailing alleged violations of basic church-state separationist principles, the entirety of your publications is inundated with both: (1) examples and details of POAU activities which were legislation oriented; and (2) implied and express calls to action in an attempt to unite and mobilize public opinion against impending encroachments on your separationist doctrine, the preservation of which is your reason for being.

Section 501(c)(3) of the Internal Revenue Code of 1954 provides for the exemption of the following organizations:

> "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Subsection 1.501(c)(3)-1(a)(1) of the Income Tax Regulations provides in part:

> "In order to be exempt as an organization described in section 501(c)(3) an organization must be both

> organized and operated exclusively for one or more of the purposes specified in such section. . . . "

Subsection 1. 501(c)(3)-1(c)(3)(i) of the Income Tax Regulations provides in part:

> "An organization is not operated exclusively for one or more exempt purposes if it is an 'action' organization. . . ."

Subsection 1.501(c)(3)-1(c)(3)(iv) of the Income Tax Regulations provides in part:

> "An organization is an 'action' organization if it has the following two characteristics:
>
> (a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objectives or objectives as distingiushed from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered."

The requirement that an organization exempt from income tax under Section 501(c)(3) of the Internal Revenue Code of 1954 be operated exclusively for one or more of the purposes set forth in that section is equally fundamental to qualification under Section 170(c) of the Internal Revenue Code.

In view of your objectives and the substantiality of the legislative activities undertaken in pursuit of these objectives, we have concluded that you are an "action" organization as defined in subsection 1.501(c)(3)-1(c)(3)(iv) of the Regulations. By advocating your position to others, thereby attempting to secure general acceptance of your beliefs; by engaging in general legislative activities to implement your views; and by urging the enactment or defeat of proposed legislation which you believe

inimical to your principles, you have ceased to function exclusively in the educator's role of infermant in that your advocacy is not merely to increase the knowledge of your audience, but to secure acceptance of, and action on, your views concerning legislative proposals, thereby, encroaching upon the proscribed legislative area.

Based upon the foregoing, it is our conclusion that your organization is not exempt from Federal income taxes under section 501(c)(3) of the Internal Revenue Code of 1954 and does not qualify to receive contributions deductible under section 170 of the Code. Consequently, our ruling dated July 3, 1950, is revoked.

Inasmuch as the periods of limitation for the assessment of deficiencies in Federal income tax for your taxable years ending December 31, 1961, December 31, 1962, December 31, 1963, December 31, 1964, and December 31, 1965 do not expire before April 15, 1970, you are required to file Federal income tax returns, forms 1120, for those years and for all subsequent years.

Very truly yours,

/s/ Irving Machiz
IRVING MACHIZ
District Director

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2269-70

[Filed March 3, 1971]

"AMERICANS UNITED" incorporated as PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, GLENN L. ARCHER *and* C. STANLEY LOWELL, suing on behalf of themselves and others similarly situated, PLAINTIFFS

—against—

RANDOLPH W. THROWER as Commissioner of Internal Revenue, DEFENDANT

AMENDED COMPLAINT

To the Honorable, the Judges of Said Court:

Plaintiffs, by Franklin C. Salisbury, Esq., their attorney, complaining of the defendants, allege:

1. This action is brought under Title 28, Section 1331 of the United States Code Annotated, whereby jurisdiction is bestowed on this Court in a civil action wherein the matter in controversy exceeds the sum or value of $10,000 and arises under the Constitution and laws of the United States; and by section 1340 of said Title 28, whereby jurisdiction is bestowed on this Court in any civil action arising under an Act of Congress providing for internal revenue. This action is also brought under Section 10 of the Administrative Procedures Act, 5 U.S.C. §§ 701-706.

2. (a) Plaintiffs Glenn L. Archer and C. Stanley Lowell are residents of the State of Maryland. Each is a citizen of the United States and of the State in which he resides.

(b) Plaintiff, Protestants and Other Americans United for Separation of Church and State, known as "Ameri-

cans United", is a nonprofit, educational corporation organized under the laws of the District of Columbia, with its principal offices in the State of Maryland where it is qualified as a foreign nonprofit corporation.

(c) Plaintiffs Glenn L. Archer and C Stanley Lowell are federal income taxpayers who have regularly filed income tax returns and paid federal income taxes and intend to do so for the year 1970 and future years, pursuant to the "Federal Internal Revenue Code of 1954", as amended.

3. (a) Defendant Randolph W. Thrower is the Commissioner of Internal Revenue and is by law charged with the administration and enforcement of said Federal income tax laws, including the interpretation and enforcement of said laws and the regulations relating thereto.

4. (a) This action is brought in behalf of the individual plaintiffs and all other Federal income taxpayers similarly situated. This class is so numerous that joinder of all members thereof is impractical. Questions of law and fact are involved herein which are common to all members of this class. Prosecution of separate actions by members of this class would create a risk of inconsistent or varying adjudications with respect to the members thereof.

(b) This action is brought by Americans United on its own behalf and on behalf of all of its members, whose religious and political freedom guaranteed under the First Amendment to the United States Constitution has been and is being denied by defendant's revocation of the Internal Revenue Service holding of July 3, 1950 that plaintiff was exempt from Federal Income Tax as an organization described in Section 101 (6) of the Internal Revenue Code of 1939 (corresponding to Section 501 (c) (3) of the Internal Revenue Code of 1954) for the stated reason that the organization is "an active advocate of a political doctrine"—namely, an advocate of the religious clauses of the Firsth Amendment to the Constitution of the United States.

(c) This action is brought by the individual plaintiffs because their right to "freedom of spech" and "of the

press", and "to petition the Government for a redress of grievances, as guaranted by the First Amendment to the United States Constitution, has been and is being abridged by the action of defendant under Sections 170 and 501 (c) (3) of the Internal revenue Code of 1954. (28 U.S.C. 170 (a) through (c) and 28 U.S.C. 501 (a) through (c).)

(d) This action is brought on the further ground that defendant in administering the acts in question deprives the plaintiffs of the due proces of law, guaranteed by the Fifth Amendment to the United States Constitution, in that the deprivation of the privilege of using pretax dollars to exercise first amendment rights is denied to donors of corporate plaintiff i.e. to one exempt organization a substantial portion of whose activities is the carrying on of "propaganda, or otherwise attempting to influence legislation" but is not denied to donors of other similar organizations where the "portion" is the same, but the size of the organization greater.

(e) This action is also brought by the corporate plaintiff on behalf of itself and all other similarly situated nonprofit corporations which have lost or are being threatened by a loss of their status as 501 (c) (3) organizations by action of the defendant Thrower, or predecessor, under said Federal income tax laws, while other organizations similarly situated continue to enjoy their 501 (c) (3) status and advantages.

5. The amount in controversy herein is in excess of $10,000.

6. The Federal Internal Revenue Code, Title 26, U.S. C.A. Sections 170 and 501, and the actions of defendant Thrower in giving force and effect thereto, are unconstitutional and void insofar as they deny to plaintiff Americans United and other nonprofit organizations the enjoyment of the tax status granted by said Section 501 (c) (3) because of their exercise of First Amendment rights of their members and as they deny to the individual plaintiffs the privilege of taking as an allowable deduction against income taxes a charitable contribution to Americans United or other similar nonprofit organizations used as a vehicle to exercise the rights of freedom of speech,

press, and to petition the Government for redress of grievances. The First and Fifth Amendments to the United States Constitution prohibit such an Act of Congress.

7. Moreover said statutes or acts—said portions of the Internal Revenue Code of 1954 and actions of the defendant Thrower in implementation thereof, deprive the plaintiffs and other nonprofit organizations and donors thereto of the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. Plaintiffs who believe in the worth of the religious clauses of the First Amendment are, in effect, penalized by the tax laws, as administered by defendant, because they express an opinion and advocate strict compliance with the Constitution of the United States while those who oppose, since their organizations are giants in size compared to plaintiff Americans United, may make tax deductible donations for their cause, because, among other reasons, what is "substantial" in the case of Americans United is not "substantial" in the case of others. The change of status because of the substantiality of the activities of one organization as opposed to another in expressing opinions and advocacy and influencing legislation is an unreasonable classification against plaintiff Americans United and by reason thereof, this plaintiff, and other organizations similarly situated, are being discriminated against and denied equal protection of the laws in violation of the Fifth Amendment of the United States Constitution.

The individual plaintiffs, by reason of the Congress having made the law (26 U.S.C. 170 and 501 (c) (3)) and defendant's carrying out the said law in full force and effect suffer an abridgement of their freedom of speech, of press, and their right to petition the Government for a redress of grievances, i.e., inter alia, their attempts to influence legislation which concerns their grievances. This constitutes a violation of the First Amendment.

Further the corporate plaintiff on behalf of its members and the individual plaintiffs claim that their tax dollars are being used by reason of the said sections of the Internal Revenue Code so as to aid and strengthen churches whose size permits their influencing of legis-

lation to be relatively less substantial than that of the corporate plaintiff with the result that the effect of defendant's action in giving full force and effect to the said sections of the Internal Revenue Code is to aid one religion as opposed to another, prefer one religion over another and to support certain religious activities as opposed to others so as to cause an establishment of religion and a prohibition of the free exercise of religion contrary to the strictures of the religious clauses of the First Amendment to the United States Constitution.

OTHER ALLEGATIONS

This suit involves a genuine case or controversy between the plaintiffs and the defendants.

The exemption clause of 501 (c) (3) amounts to an invalid unconstitutional delegation of legislative power in that the statutory standards of "substantiality" and "propaganda" are lacking in specificity for the carrying out of the purpose of Section 501 (c) (3). The uncertainty of the definition of "substantiality" and "propaganda" are so apparent as to be devoid of meaning and inadequate as a standard for administrative action.

The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless an injunction be granted. As a result of defendant's action the corporate plaintiff has operated at a loss for the year 1970, for the first time since 1949, by reason of the defendant's action in revoking its 501 (c) (3) status, which, if continued, will inevitably force the corporate plaintiff to cease its activities as an association for the purpose of assisting persons who seek legal redress for infringement of their constitutionally guaranteed, and other rights, by access to the courts and to the legislatures. The loss exceeded ten thousand dollars.

The plaintiffs do not seek to enjoin or restrain the assessment or collection of federal taxes.

No assessment for federal taxes has been made against the plaintiffs as a result of the revocation of Section 501 (c) (3) status of Americans United nor do the plaintiffs seek a refund of federal taxes.

The defendant acted in an arbitrary and capricious manner and has abused his discretion in applying the substantial "influencing" clause of the statutory exemption, which is a part of 501 (c) (3), or in the alternative, if the defendant has correctly applied the exemption language, then the exemption clauses themselves are null and void as being contrary to the First and Fifth Amendments to the United States Constitution, as well as constituting an invalid delegation of legislative power.

WHEREFORE, plaintiffs pray that a three-judge constitutional court be convened pursuant to Title 28, U.S. C.A., Sections 2281 and 2284 and that on behalf of themselves and others similarly situated, the following relief be granted:

1. A declaratory judgment that the exemption clauses of Section 501 (c) (3) are separable from the remainder of the section and are null and void as being unconstitutional under the First and Fifth Amendments to the United States Constitution and unconstitutional as an invalid delegation of legislative power to an administration official.

2. Judgment requiring defendant Thrower to reevaluate corporate plaintiff as a Section 501 (c) (3) charitable corporation and to reinstate corporate plaintiff on the "Cumulative List of Organizations Described in Sec. 170 (c) of the Internal Revenue Code of 1954" published by the Government Printing Office if found to be eligible under Sec. 501 (c) (3).

3. Judgment enjoining defendant Thrower from enforcing Sections 170 (c) and 501 (c) (3) of Title 26 U.S. C.A., so as to deprive the individual plaintiffs and others similarly situated of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections.

4. Judgment, in the alternative, requiring defendant Thrower to reopen its revocation proceedings against the corporate plaintiff in the light of the final decision in this case and reevaluate the corporate plaintiff's status as a Section 501 (c) (3) charitable corporation.

5. Judgment that the action of the defendant in changing the status of the corporate plaintiff was arbitrary and capricious.

6. Judgment assessing the costs and expenses of this action against the defendants.

7. Such other and further relief as the nature of the case requires.

/s/ Franklin C. Salisbury
FRANKLIN C. SALISBURY
Attorney for Plaintiffs
919 - 18th St., N.W.,
(Rm. 800)
Washington, D. C.
Tel: 301-588-2120

Of Counsel

NOEL THOMPSON, ESQ.
919 - 18th St., N. W.
Washington, D .C.
Tel: 703-527-7749

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2269-70

[Filed March 3, 1971]

"AMERICANS UNITED" incorporated as PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, GLENN L. ARCHER *and* C. STANLEY LOWELL, suing on behalf of themselves and others similarly situated, PLAINTIFFS

v.

RANDOLPH W. THROWER as Commissioner of Internal Revenue, DEFENDANT

MOTION TO DISMISS

Comes now the defendant, Randolph W. Thrower, Commissioner of Internal Revenue, by his attorneys, and pursuant to Rule 12(b), Federal Rules of Civil Procedure, moves this Court for an order dismissing the plaintiffs' complaint on the following grounds:

1. The Court lacks jurisdiction over the subject matter of this action.
2. The complaint fails to state a claim upon which relief can be granted.
3. The complaint seeks a declaratory judgment with respect to federal taxes which is prohibited by Section 2201, Title 28, United States Code.

4. The complaint seeks injunctive relief which is barred by Section 7421 of the Internal Revenue Code of 1954.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney
RICHARD A. SCULLY
Trial Attorney

/s/ John J. McCarthy
JOHN J. MCCARTHY
Chief
General Litigation Section

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2269-70

"AMERICANS UNITED" incorporated as PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, GLENN L. ARCHER *and* C. STANLEY LOWELL, suing on behalf of themselves and others similarly situated, PLAINTIFFS

v.

RANDOLPH W. THROWER as Commissioner of Internal Revenue, DEFENDANT

ORDER

Upon the aforegoing Motion of the Plaintiffs, leave to to amend by filing an Amended Complaint is HEREBY GRANTED this 3rd day of March, 1971 by the United States District Court for the District of Columbia.

/s/ John H. Pratt
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA CIRCUIT

No. 2269-70

[Filed March 9, 1971]

"AMERICANS UNITED" incorporated as Protestants and Other Americans United for Separation of Church and State: Glenn L. Archer and C. Stanley Lowell, suing on behalf of themselves and others similarly situated, PLAINTIFFS

v.

RANDOLPH W. THROWER as Commissioner of Internal Revenue, DEFENDANT

ORDER

Upon consideration of the plaintiffs' petition to convene a three-judge constitutional court pursuant to the provisions of 28 U.S.C. § 2282, and the defendant's motion to dismiss the above-entitled action, and upon argument of counsel for the plaintiffs and the defendant; it appearing to the Court that the plaintiffs' amended complaint does not raise a substantial constitutional question, it is this 9th day of March, 1971,

Ordered and Adjudged that the plaintiffs' petition to convene a three-judge court in this action be and the same is hereby denied.

It also appears to the Court that the provisions of 26 U.S.C. § 7421 (a) prohibit the injunctive relief sought in the plaintiffs' amended complaint; that the provisions of 28 U.S.C. § 2201 prohibit the declaratory relief sought therein; and that the Court lacks jurisdiction to grant the relief requested. *National Council on the Facts of Overpopulation* v. *Caplin*, 224 F. Supp. 313 (D. D.C., 1963). Accordingly, it is further

Ordered and adjudged that the defendant's motion to dismiss be granted and the plaintiffs' complaint is hereby dismissed.

/s/ John H. Pratt
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1299

"AMERICANS UNITED" INC., ET AL, APPELLANTS

v.

JOHNNIE M. WALTERS, COMMISSIONER OF INTERNAL REVENUE

Appeal from the United States District Court for the District of Columbia

---

Decided January 11, 1973

Mr. Alan Morrison, with whom *Mr. Franklin C. Salisbury* was on the brief, for appellants.

Mr. Leonard J. Henzke, Jr., Attorney, Tax Division, Department of Justice, with whom *Messrs. Thomas A. Flannery*, United States Attorney at the time the brief was filed, and *Grant W. Wiprud*, Attorney, Tax Division, Department of Justice, were on the brief, for appellee.

Before: FAHY, *Senior Circuit Judge*, TAMM and WILKEY, *Circuit Judges*.

Opinion by *Circuit Judge* TAMM.

Concurring Opinion by *Circuit Judge* WILKEY, at p. 24.

TAMM, *Circuit Judge*: This case comes to us on appeal from an order in the district court denying appellants' (plaintiffs below) petition to convene a three-judge district court pursuant to the provisions of 28 U.S.C. § 2282 (1970), and granting appellee's motion to dis-

miss. For the reasons stated at length below we affirm the action of the district court as it pertained to the individual appellants involved, but as to the corporate appellant reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Appellant Americans United, incorporated as "Protestants and Other Americans for Separation of Church and State," is organized under the laws of the District of Columbia and is a nonprofit educational corporation. On July 3, 1950, the Commissioner of Internal Revenue issued a ruling that Americans United qualified as tax exempt under § 101(6) of the Internal Revenue Code of 1939, the predecessor to § 501(c)(3) of the 1954 Code.[1] Consequently, for a period of nearly twenty years not only was Americans United free from taxation upon its income, but also contributors to the corporation were entitled to the deductions provided under § 170 of the 1954 Code (§ 23(q) of the 1939 Code).[2] On April 25, 1969, a letter ruling from the Service revoked the 1950 ruling, holding that Americans United had violated §§ 170(c)(2)(D) and 501(c)(3) of the Code by devoting a substantial part of its activities to attempts to in-

[1] 26 U.S.C. § 501(c)(3) (1970):

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[2] Organizations which have secured rulings that they are tax exempt under § 501(c)(3) are described in I.R.S. Publication No. 78, *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*. The requirements for §§ 501(c)(3) and 170(c)(2) are nearly identical in every respect.

fluence legislation. More particularly, the letter ruling stated that although part of Americans United's activities could be classified as "educational" or "charitable" within the meaning of § 501(c)(3) of the Code, it was, nonetheless, an "active advocate of a political doctrine." The majority of the corporation's activities were held to be in furtherance of the following goals: "the mobilization of public opinion; resisting every attempt by law or the administration of law which widens the breach in the wall of separation of church and state; working for the repeal of any existing state law which sanctions the granting of public aid to church schools; and uniting all 'patriotic' citizens in a concerted effort to prevent the passage of any federal law allotting, directly or indirectly, federal education funds to church schools."

While Americans United still retained a tax exempt status as an organization described in § 501(c)(4) of the Code,[3] the removal of its § 501(c)(3) exemption allegedly proved to be most damaging. Americans United states that its resulting removal from the list of § 170 corporations to whom tax free contributions could be made dried up its well of contributory resources to such an extent that it operated at a deficit for the first time in its history during fiscal year 1970. Consequently, on July 30, 1970, this action was commenced in the United States District Court for the District of Columbia. Two individual plaintiffs, Archer and Lowell, apparently suing as taxpayers who intended in the future to contribute to Americans United, joined with Americans United in bringing the class action.

The amended complaint in the district court averred violations of various first and fifth amendment liberties

---

[3] 26 U.S.C. § 501(c)(4) (1970):

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

and guarantees: (1) §§ 170 and 501, and the action of the Commissioner in giving force and effect thereto, were unconstitutional and void insofar as they denied § 501 (c) (3) status to the corporate appellant by reason of its exercise of first amendment rights, and likewise denied individual appellants the privilege of deducting the contributions used as a vehicle to exercise their first amendment rights. (2) Since what was a "substantial part" in the case of Americans United was not a "substantial part" in the case of other, larger organizations opposed to appellants' viewpoint, the change of status because of the substantiality of the activities of one organization as opposed to another in expressing opinions and influencing legislation was an unreasonable classification against Americans United, and by reason thereof Americans United and other organizations similarly situated were being discriminated against and denied equal protection of the laws in violation of the fifth amendment of the United States Constitution. (3) Appellants claimed that their tax dollars were being used by reason of §§ 170 and 501 in a manner that aided and strengthened churches whose size permitted their influencing of legislation to be "relatively less substantial than that of the corporate [appellant]," and that appellee's actions in enforcement thereof constituted violations of the establishment and free exercise clauses of the first amendment. (4) The exemption clause of § 501 (c) (3) amounted to an invalid delegation of legislative power "in that the statutory standards of 'substantiality' and 'propaganda' [were] lacking in specificity for the carrying out of the purpose of Section 501 (c) (3)." (5) Finally, the defendant acted arbitrarily and capriciously in abuse of his discretion in applying, in this situation, the "substantial influencing" clause of the statutory exemption of § 501 (c) (3).

Appellants' complaint founded jurisdiction for the action upon 28 U.S.C. § 1331 (1970) (civil action where amount in controversy exceeds $10,000 and which arises under the Constitution and laws of the United States), 28 U.S.C. § 1340 (1970) (whereby jurisdiction is bestowed in the federal district court in any civil action

arising under an Act of Congress providing for internal revenue), and § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970) (making final agency action subject to judicial review). Appellants also sought the convention of a three-judge district court pursuant to 28 U.S.C. §§ 2282[4] and 2284 (1970), and requested the following relief: (1) Declaratory judgment that the "exemption clauses of Section 501(c)(3) [were] separable from the remainder of the section and [were] null and void" as unconstitutional under the first and fifth amendments, and as an invalid delegation of legislative power.[5] (2) Judgment "requiring" the appellee to "reevaluate" corporate appellant as a § 501(c)(3) charitable corporation and to reinstate corporate appellant on the *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, if found to be eligible under the newly constituted § 501(c)(3). (3) Judgment restraining the appellee from enforcing §§ 170(c) and 501(c)(3) so as to deprive the individual appellants "of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections." (4) Judgment that appellee acted in an arbitrary and capricious manner in changing the status of corporate appellant. (5) In the alternative, judgment requiring appellee to reopen the revocation

[4] 28 U.S.C. § 2282 (1970):

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by and district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[5] In this manner the appellants seek to continue the viability of § 501(c)(3) without the challenged "substantial part" exception to the exemption. As the Court of Appeals for the Tenth Circuit has recently stated: "Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverege of the statute." Moritz v. Commissioner, No. 71-1127 (November 27, 1972), at p. 8. *Cf.* Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring), and Skinner v. Oklahoma, 316 U.S. 535, 542-43 (1942).

proceedings and reevaluate the corporate appellant "in the light of the final dcision in this case."

Appellee filed a motion to dismiss, based essentially on 28 U.S.C. § 2201 (1970),[6] which prohibits declaratory judgments "with respect to Federal taxes," and 26 U.S.C. § 7421(a) (1970),[7] which prohibits suits "for the purpose of restraining the assessment or collection of any tax." The trial court denied appellants' petition to convene a three-judge court, finding that no substantial constitutional question was raised, and granted appellee's motion to dismiss, citing *National Council on the Facts of Overpopulation* v. *Caplin*, 224 F.Supp. 313 (D.D.C. 1963).

Alleging error in both aspects of the trial court's order, appellants bring this appeal. Contending that no taxes have been assessed or collected, that this is a civil rights rather than tax case, and that they have no other adequate remedy, appellants maintain that the provisions of 26 U.S.C. § 7421(a) (1970) and 28 U.S.C. § 2201 (1970) cannot be used to prohibit the declaratory and injunctive relief sought. They further contend that they have raised substantial constitutional questions meriting the invoking of a three-judge court under the standards established in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962). Appellee's posture on appeal

---

[6] 28 U.S.C. § 2201 (1970):

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[7] 26 U.S.C. § 7421(a) (1970):

> Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The exceptions provided are not applicable to this case.

is somewhat different, of course, and in addition to the grounds listed by the trial judge for dismissing the action he relies upon the doctrine of governmental immunity, claiming this to be an unconsented suit against the United States. *Louisiana* v. *McAdoo*, 234 U.S. 627 (1914).

II. JURISDICTION

1. *Introduction*

The statutes providing for three-judge "constitutional" courts, adopted to avoid impolitic action on the part of lone federal district judges in matters of broad regulatory scope, are procedural rather than substantively jurisdictional in nature. A complaint which raises substantial constitutional questions and otherwise meets the requirements of § 2282 can and should be dismissed if independent district court jurisdiction is found wanting. "[T]he provision requiring the presence of a court of three judges necessarily assumes that the District court has jurisdiction." *Ex Parte Poresky*, 290 U.S. 30, 31 (1933). This court has held that a dismissal for want of jurisdiction is properly a matter for a single district judge without considering the question of convening a three-judge court. *Eastern States Petroleum Corp.* v. *Rogers*, 280 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960). *Accord, National Council on the Facts of Overpopulation* v. *Caplin*, 224 F.Supp. 313 (D.D.C. 1963). The first order of business for the single district judge is simply put (although, as here, not so simply decided): Does the district court have jurisdiction even to consider the applicability of a three-judge panel, or are the plaintiffs out of court for lack of subject matter jurisdiction?

The anti-injunction statute (26 U.S.C. § 7421 (1970)) by its terms denies jurisdiction to "any court" in actions seeking to enjoin the assessment or collection of taxes. If such a statute is applicable here the appellants cannot be afforded the relief requested, regardless of the substantiality of the constitutional questions

raised. *See, e.g., Harvey* v. *Early*, 160 F.2d 836 (4th Cir. 1947).

Although its legislative history may be "shrouded in darkness," [8] the *raison d'etre* of § 7421(a) was illuminated by Chief Justice Warren in *Enochs* v. *Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. *In this manner the United States is assured of prompt collection of its lawful revenue.* (Emphasis added, footnote omitted.)

See also State Railroad Tax Cases, 92 U.S. 575, 613-14 (1875). Section 7421(a) was thus born of administrative and governmental necessity, used to prevent intermeddling in the tax collection process. An offspring of the equity rule that a suit to enjoin the collection of taxes was not maintainable unless an adequate remedy at law was lacking, its language is much stronger and more encompassing in scope. Even if it can be shown that irreparable injury will result if the collection is effected, § 7421(a) bars a suit for an injunction in the absence of very special circumstances. *See Enochs, supra*, 370 U.S. at 6.

The history of the Declaratory Judgments Act and § 2201 is somewhat different. When initially promulgated in 1934,[9] the phrase "except with respect to federal taxes" was absent from § 2201. Consequently, federal taxpayers (innovative as they are) quickly utilized it to obtain declaratory judgments holding various tax statutes unconstitutional, something they were barred from accomplishing under the anti-injunction statute.[10]

---

[8] *See* Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 HARV. L. REV. 109 (1935).

[9] Act of June 14, 1934, ch. 512, 48 Stat. 955.

[10] *See, e.g.*, Penn v. Glenn, 10 F.Supp. 483 (W.D. Ky. 1935), *app. dismissed per curiam*, 84 F.2d 1001 (6th Cir. 1936), and F.G. Vogt & Sons, Inc. v. Rothensies, 11 F.Supp. 225 (E.D. Pa. 1935). Although both courts refused to grant injunctive relief,

Congress (innovative as it is) quickly reacted and amended § 2201 to include the contentious phrase.[11] The Senate Finance Committee, in reporting out the amended version, stated that the "application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress [as represented today by § 7421(a)] with respect to the determination, assessment, and collection of Federal taxes."[12] Literally broader than § 7421(a) in its preclusion of tax oriented remedies, the § 2201 exception has literarily been found coterminus with that provided by § 7421(a). *McGlotten* v. *Connally*, 338 F.Supp. 448 (D.D.C. 1972). *See also Bullock* v. *Latham*, 306 F.2d 45 (2d Cir. 1962), and *Tomlinson* v. *Smith*, 128 F.2d 808 (7th Cir. 1942). We believe that to be a correct interpretation, one soundly based on the history of the exception and on the paradoxicalness of authorizing injunctive relief while depriving courts the authority to declare the rights of the parties in connection with the injunctive relief. The breadth of the tax exception of § 2201 is co-extensive with the effect of § 7421(a), and so the applicability of the latter to our situation is determinative of jurisdiction.

2. *Individual Appellants*

The springboard of the action before us—namely that the removal of Americans United from the status of those corporations to whom tax deductible contributions can be made has wreaked havoc upon its financial stature—is the same for both the individual and corporate appellants. They seek to keep Americans United afloat. However, the posture of the appellants and the effect that the relief

---

they expected the tax collector to "respect the decision." If he did not do so and the taxpayer was forced to sue for a refund, "the trial court would probably be justified in refusing him a certificate of probable cause, and thus he and his bond would be liable for the judgment obtained." 11 F.Supp. at 231. This was a neat circumvention of the anti-injunction statute, but one that Congress did not appreciate.

[11] Act of August 30, 1935, ch. 829, § 405, 49 Stat. 1027.

[12] S. REP. No. 1240, 74th Cong., 1st Sess. 11 (1935).

sought would have upon them is distinctively different. Stripped to its barest essentials, the individual appellants' relief relates directly to the assessment and collection of taxes. They seek, despite their averments that no taxes have been assessed and that this is a civil rights rather than tax case, to enjoin the appellee from assessing or collecting taxes on those dollars contributed by them to Americans United. In paragraph 3 of the relief portion of appellants' amended complaint this becomes evident:

> [Plaintiffs pray that the following relief be granted:] Judgment enjoining defendant Thrower from enforcing Sections 170(c) and 501(c)(3) of Title 26 U.S.C.A., so as to deprive the individual plaintiffs and others similarly situated of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections.

The allegations that the tax will be assessed and collected in violation of their constitutional rights is to no avail. *See Dodge* v. *Osborn*, 240 U.S. 118 (1916); *Harvey* v. *Early*, 160 F.2d 836 (4th Cir. 1947); *Moon* v. *Freeman*, 245 F.Supp. 837 (E.D. Wash. 1965); *National Council on the Facts of Overpopulation* v. *Caplin*, 224 F.Supp. 313 (D.D.C. 1963). The allegation that no tax has as yet been assessed and that therefore the action is somehow without §7421(a), we find to be equally without merit. In the words of Chief Judge Sirica in *National Council, supra*, 224 F.Supp. at 314, "[t]he Court cannot agree that the immunity of a tax assessment from court-imposed restraint has anything to do with the timing of that restraint." Finally, the individual appellants have not shown the high probability of success on the merits that warrants the non-application of § 7421(a) under the standards enunciated in *Enochs* v. *Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

> [I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and under the *Nut Margarine* case, [*Miller* v. *Standard Nut Margarine*

> *Co.*, 284 U.S. 498 (1932)], the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax." *Id.*, at 509.
>
> We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim may the suit for an injunction be maintained.

The action brought and the relief sought by the individual appellants directly ranges within the ambit of § 7421(a), and as to them the action of the district court in dismissing the case was correct.

3. *Corporate Appellant*

Americans United, at the present time exempt from taxation on income by virtue of 26 U.S.C. § 501(c)(4) (1970), does not seek in this lawsuit to enjoin the assessment or collection of its own taxes. Because of the "tax breaks" attendant to contributions to corporations qualifying under § 170(c) of the Code, qualification thereunder is a precious possession and removal from the *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954* is a damaging—sometimes fatal—injury to the financial status of any "charitable" organization. Potential contributors with a minimum of business acumen are careful to get the most for their contributed dollar, and one certain way not to do so is to contribute to non-§ 170 corporations. Appellant, therefore, presented with the dollar dilemma of finding prospective contributors closing their wallets, seeks to have the court restrain the Commissioner from meting § 501(c)(3) and § 170(c) qualifications in the alleged unconstitutional manner. A necessary side effect of any relief, of course, will be to allow contributions which otherwise would be made with after tax dollars to become deductible. Consequently, the appellee

alleges that this is in essence a suit to restrain the assessment or collection of a tax and barred by § 7421(a).

McGlotten v. *Connally*, 338 F.Supp. 448 (D.D.C. 1972), involved a class action brought by a black American denied membership in an Elks Lodge because of his race. The plaintiff sought to enjoin the Secretary of Treasury from granting tax benefits to fraternal and nonprofit organizations which excluded nonwhites from membership. The statutes involved were similar to those in the case before us, granting various exemptions both to the organizations and their contributors. The plaintiff alleged that the statutes were either unconstitutional, unconstitutionally interpreted, or that the benefits granted thereby were in violation of Title VI of the Civil Rights Act of 1964. The defendant moved to dismiss citing §§ 2201 and 7421(a), but a three-judge district court denied the motion. Chief Judge Bazelon, writing for the court, stated:

> Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit. To hold otherwise would require the kind of ritualistic construction which the Supreme Court has repeatedly rejected. Even where the particular plaintiff objects to his own taxes, the Court has recognized that the literal terms of the statute do not apply when "the central purpose of the Act is inapplicable." In the present case, the central purpose is clearly inapplicable. It follows that neither § 7421(a) nor the exception to the Declaratory Judgment Act prohibits this suit.

Id. at 453-54 (footnotes omitted).

A case from the opposite side of the restraint coin, wherein the Commissioner threatened to remove the tax exempt status of an organization because of racially discriminatory practices, is *Bob Jones University* v. *Connally*, 341 F.Supp. 277 (D.S.C. 1971). Fearing that a drop in

its level of contributions would cause irreparable harm, the University sought a preliminary injunction restraining the Commissioner from removing its § 501(c)(3) qualification. Faced with identical §§ 2201 and 7421(a) arguments, the district judge granted the injunction. The court found that the gravamen of the plaintiff's complaint was not to ask the court to substitute its views for that of the Commissioner, *see Jolles Foundation, Inc.* v. *Moysey*, 250 F.2d 166 (2d Cir. 1957), but rather to prevent the Commissioner from acting "beyond the authority granted by the constitution or by the Congress, and to read into the Internal Revenue Laws powers that are not expressly given and that were never intended by Congress." 341 F.Supp. at 282-83. The court went on to state:

> If there were no contest as to the legality or the power of the defendants to revoke under existing law plaintiff's tax exempt status because of its admitted racial discriminatory admissions policy, but was instead a case involving the applicability of such a rule to the plaintiff, it would then appear to be a case where this court was asked to preempt discretionary power of a federal office which it would be powerless to do. . . . Plaintiff is not challenging the applicability of the rule, but the legality of the rule itself.
>
> Bob Jones University is not seeking a declaratory judgment, but rather seeks to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority. Consequently, it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due. Plaintiff is seeking to enjoin what it contends to be illegal and unconstitutional actions or threatened actions on the part of officials of the United States Government which it claims would lead to irreparable harm . . . .

Id. at 283.

Here, as in *Bob Jones*, the essence of appellants' attack is not against the applicability of a test or their ability to qualify under presently existing standards. As the appellee correctly points out in his brief, "[appellants] do not seriously contend that Americans United qualifies under Section 501(c)(3) as written. Rather, they contend that the clause disqualifying organizations which devote a substantial part of their activities to political propaganda and lobbying should be elided as unconstitutional, and they seek a declaratory judgment to that effect."

Appellee principally relies upon *Jolles Foundation, Inc.* v. *Moysey, supra.* Although there is language in *Jolles* regarding § 2201 we believe it to be distinguishable and not persuasive. In *Jolles* the appellant alleged that the Commissioner erred in his determination of its tax exempt qualification, and brought an action which the court correctly viewed as in the nature of mandamus "against the Commissioner to compel him to reverse his position based upon the activities of the Foundation already held not to come within the exemption . . . ." 250 F.2d at 169. We submit that the *Jolles* case did not involve the alleged unconstitutionality of a taxing statute, but a challenge respecting the judgment of the Commissioner, and manifestly "the court cannot presume to speak for the Commissioner or take over his duty to pass upon the tax status of organizations applying for exemption." *Id.*

Here, as in *McGlotten* and *Bob Jones*, no tax has been or will be assessed against the corporate appellant. The restraint upon assessment and collection is at best a collateral effect of the action, the primary design not being to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation. The corporation, alleging constitutional violations of an identical nature to that of the individual appellants, irreparable injury, and an inadequate legal remedy,[13] does so in a posture re-

[13] Since Americans United qualifies as a tax exempt organization pursuant to § 501(c)(4) of the Code, the normal avenue of challenge, tax refund litigation, is not available. Appellee in his Supplemental Memorandum and at oral presentation has for the

moved from a restraint on assessment or collection. We find, as did the courts in *Bob Jones*, *McGlotten*, and impliedly the court in *Green* v. *Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), on permanent injunction, 330 F.Supp. 1150 (D.D.C. 1971), *aff'd per curiam*, 404 U.S. 997 (1971),[14] that it would be an all too encompassing interpretation of § 7421(a) to consider it as precluding a suit of this nature, and refuse to so hold.[15]

---

first time suggested two additonal "adequate" legal remedies available to the appellant corporation. These are the federal social security and unemployment tax refund litigations, since § 501(c)(3) organizations are exempt from both taxes while § 501(c)(4) organizations are exempt from neither.

Appellant points out that although not required to pay social security taxes while exempt under § 501(c)(3), it elected to do so. A termination of such an election requires two years advance notice and cannot be made if the election has been in effect more than eight years, as it was here. Moreover, under 26 U.S.C. § 3121(k)(3) (1970), an organization which once terminates its election to pay those taxes voluntarily cannot renew the election. Although the unemployment tax refund litigation is not fraught with perils of equal magnitude, it is subject to certain conditions and, we feel, is so far removed from the mainstream of the action and relief sought as to hardly be considered adequate.

[14] *Green* involved a class action brought by black students and their parents to enjoin the Secretary of Treasury from granting tax exempt status to private schools discriminating against blacks. A three-judge district court was convened and, Judge Leventhal writing, determined that the Internal Revenue Code could not be interpreted as granting a tax exempt status to such organizations. Although faced with governmental insistence that the relief sought was barred by §§ 2201 and 7421(a), the court did not address the problem but granted the injunctive relief. The case was affirmed *per curiam* and without opinion by the Supreme Court, but as by that time the Commissioner had "voluntarily" altered the rules to comply with the decision, and the government did not press the appeal, the precise force and effect of the affirmance is questionable.

[15] The ultimate effect of the *Green* and *McGlotten* litigations was to increase the tax revenue of the United States, while at least theoretically the effect of *Bob Jones* and the case at hand is to decrease the tax revenue. We do not believe, and appellee has in fact agreed, that such a fact is of distinguishable merit. It is untenable that a party seeking to have an entire section declared unconstitutional, thus removing the exemption and theoretically increasing the tax revenue, should be treated differently from one seeking

We do not adopt the doctrine that § 7421(a) is inapplicable so long as a party does not seek to restrain the collection or assessment of its own taxes. Our holding is much narrower. In those situations where a non-taxpayer sues in the stead of the taxpayer,[16] *e.g.*, the shareholder suits brought on behalf of a reluctant corporation, *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 464 (1903), *cf.*, *Helvering* v. *Davis*, 301 U.S. 619, 639-40 (1937), or where the tax itself directly operates to place a financial burden upon the non-taxpayer,* *e.g.*, where the valuation of an estate for estate tax purposes would affect the tax liability of a non-taxpayer at a future date, *West Chester Feed & Supply Co.* v. *Erwin*, 438 F.2d 929 (6th Cir. 1971), when a tax levied upon processing oil would directly affect one about to enter the processing business, *Gardner* v. *Helvering*, 88 F.2d 746 (D.C. Cir. 1936), *cert. denied*, 301 U.S. 684 (1937), *au fond* it is a suit to restrain the collection or assessment of a tax "indirectly" levied upon the plaintiff, and within the purpose and proscription of § 7421(a).

What we have then is a hybrid sort of fellow. The challenge upon which we reverse runs not to the exercise of discretion or the everyday working affairs of the Com-

---

to remedy the discriminatory underinclusion by striking the unconstitutional clause, and thus theoretically decreasing the tax revenue.

In reaching our conclusion regarding the applicability of § 7421(a) we have considered, and found unpersuasive, the decisions in Liberty Amendment Committee of the U.S.A. v. United States, Civ. No. 70-721-HP (C.D. Cal. June 19, 1970), *aff'd per curiam*, No. 26,507 (9th Cir. July 7, 1972), and Crenshaw County Private School Foundation v. Connally, 343 F.Supp. 495 (M.D. Ala. 1972).

[16] Arguably Americans United's purpose could be that of "representing" its remaining contributors who now face the assessment of taxes on their contributed dollars—a sort of "end run" maneuver to avoid the proscriptions of § 7421(a) that we have found to apply to suits brought by those contributors—but we do not believe such to be a realistic appraisal of the situation. Americans United is concerned about its own preservation which is threatened not by the indirect burden of the tax upon them, but by the "unconstitutional" action of the Commissioner resulting in the driving of prospective contributors to other "charities."

[*The word has been changed to reflect the correction made by the court. See p. , *infra*.]

mission, something we feel history and good sense implore us to leave alone, nor is it concerned with taxes levied either directly or "indirectly" upon the corporate appellant, something which § 7421(a) mandates us to leave alone.[17] Finally, an alternate legal remedy in the form of adequate refund litigation is unavailable. The lack of a meaningful alternate form of relief is important herein for two reasons: first, its absence solidifies our belief that the situation *sub judice* is without the purpose and expected scope of § 7421(a), and second, its absence renders equitable relief most appropriate. We suspect that the birthrate of such a hybrid will be so low that the proverbial "flood gates" to judicial review of Internal Revenue Service action will remain closed.

4. *Sovereign Immunity*

Appellee, relying chiefly upon *Louisiana* v. *McAdoo*, 234 U.S. 627 (1914), urges the court to recognize this suit as one against the United States to which consent has not been given, and hence barred by the doctrine of sovereign immunity. We feel that the appellee has failed to recognize this suit as rightly falling within the exceptions to the doctrine as reiterated by the Supreme Court in *Dugan* v. *Rank*, 372 U.S. 609, 622 (1963). Those exceptions relate to (1) actions by officers beyond their statutory powers, and (2) actions within the scope of their authority, when the powers themselves or the manner in which they are exercised are constitutionally void. The appellants do not challenge the right of the Commissioner to adopt rules and regulations, but they do challenge his right to enforce a statute which they assert violates various constitutional liberties. This clearly falls within the "exception" almost as broad as the "rule," that "sovereign immunity does not prevent a suit against a state

[17] Standing to sue and ripeness problems, neither of which we find to preclude the lawsuit before us, could also work to prevent other litigation which arguably would be without the scope of §§ 2201 and 7421(a).

or federal officer who is acting either beyond his authority or in violation of the Constitution." [18]

III. SUBSTANTIAL CONSTITUTIONAL QUESTION

The single district court judge below denied appellants' motion to convene a three-judge panel pursuant to 28 U.S.C. § 2282 (1970), for the stated reason that the challenge raised no substantial constitutional questions. We reverse and remand with respect to the only remaining appellant in this litigation, Americans United, with instructions to promptly convene a § 2282 panel.

In *Bulluck* v. *Washington*, No. 24,862 (D.C. Cir. Jan. 19, 1972), *rehearing en banc.* May 31, 1972, we have recently had an opportunity to restate the scope of a district court's inquiry (and consequently our scope of review) when confronted with an application for a § 2282 panel. The court is limited to questioning (1) whether the constitutional questions raised are substantial, which in turn is limited to a determination of whether they are "obviously without merit" or so clearly unsound by reason of previous decisions of the Supreme Court "as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933); (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case presented otherwise comes within the requirements of the three-judge panel. *Idlewild Bon Voyage Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962).

---

[18] K. Davis, ADMINISTRATIVE LAW TREATISE 522 (1958). Professor Davis treats Ex Parte Young, 209 U.S. 123 (1908), as the "foundation case" for such a rule:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id. at 159-160. *See also* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304-05 (1952).

As our discussion of the case to this point has shown, what appellant effectively seeks here is a restraint on the enforcement of the "substantial part" clause of § 501(c)(3). It accomplishes this by seeking a declaratory judgment that the section is unconstitutional, and by requesting injunctive relief to force the Commissioner to reclassify it and other similarly situated corporations as tax exempt if they are found to qualify. This type of action, affecting legislation of broad regulatory scope and amounting to a restraint on its enforcement as written and interpreted, is within the § 2282 mandate. Satisfied that the other requirements for the three-judge panel are present, and that equitable relief is properly requested, we turn to the substantiality question.

Although as can be seen from our earlier listing [19] appellants originally raised a multitude of possible constitutional violations, at oral argument and in its Reply Brief it has narrowed its focus, and we believe wisely so, to the "discriminatory" aspects of § 501(c)(3). Basically, this is that since larger, wealthier organizations can engage in conduct identical to that of appellant without, because of their size, falling within the "substanaial part" category of § 501(c)(3) and hereby losing their precious tax exempt status (and more precious listing among those corporations to whom tax free contributions can be made), § 501(c)(3) is unconstitutionally discriminatory in violation of the equal protection ramifications of the due process clause of the fifth amendment. *See Bolling* v. *Sharpe*, 347 U.S. 497 (1954).[20] We find such a claim, novel as it may be, neither obviously without merit nor foreclosed by previous Supreme Court decisions.

---

[19] *See* pp. 4-5, *supra*.

[20] It is true that in Helvering v. Lerner Stores Co., 314 U.S. 463, 468 (1941), Justice Douglas wrote that "[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause." The great weight of authority today, however, as exemplified by *Bolling*, *Schneider* v. *Rusk*, 377 U.S. 163 (1964), and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), is that "[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" 377 U.S. at 168.

Appellee relies chiefly upon *Cammarano* v. *United States*, 358 U.S. 498 (1959), but *Cammarano*, while disposing of appellants' claim that first amendment rights are violated by the questioned statute, does not attempt to deal with possible discriminatory conduct. In *Cammarano* liquor dealers had expended funds in advertising campaigns against statutory resolutions in Washington and Arkansas which would have effectively closed their businesses, and sought to deduct their costs as ordinary business expenses. The lower courts ruled that "the payments . . . were 'expended for . . . the . . . defeat of legislation' within the meaning of Treas. Reg. 111, § 29.23 (0)-1 and were therefore not deductible as ordinary and necessary business expenses under § 23(a)(1)(A) of the Internal Revenue Code of 1939." *Id.* at 501. The court, per Mr. Justice Harlan * continued:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas."

Id. at 513. Americans United, on the other hand, alleges just that discriminatory conduct found lacking in *Cammarano*. This discrimination relates solely to the "size" of the organization, which appellants allege is directly related to its wealth and power structure, and comes into play during and because of the exercise of first amendment protected liberties. By allowing larger, richer organizations more "dollar punch" in terms of "propagandizing" and "influencing legislation" before their respective activities are considered "substantial," the Commissioner is accused of following the mandate of

---

[* The name of the Justice has been changed to reflect the correction made by the court. See p. , *infra*.]

§ 501(c)(3) and treating identical activity differently, solely on the basis of the size, or wealth, of the acting party.

Nearly every jurist and attorney today is aware of the flood of cases before the bench raising important questions, at least in the context of the fourteenth amendment equal protection clause, concerning the interpretation of "fundamental rights," "suspect categories," and their resultant "compelling state interest test." A case similar to the redoubtable *Serrano* v. *Priest*, 487 P.2d 1241 (Cal. 1971), which struck down California's system of public school financing as violative of the fourteenth amendment, and straightforwardly classified both "wealth" and "education" as categories calling for stricter justification in terms of equal protection, is presently submitted before the United States Supreme Court. *San Antonio Independent School District* v. *Rodriguez*, No. 71-1332 (argued 10/12/71, 41 U.S.L.W. 3197). The Court's decision in that case should prove most instructive in an area of concern before us—"discrimination" of this type as within the "wealth" category, and the status of "wealth" as giving rise to the compelling interest test.

If discrimination exists here it relates to the exercise of the most fundamental of rights, those protected by the first amendment,[21] and raises questions concerning the directness of its relationship to wealth. We are aware that the various tests of which we speak have arisen in the context of the fourteenth amendment, but find that they are nonetheless relevant to the considera-

---

[21] *See* dissent of Marshall, J., in California v. LaRue, 41 U.S.L.W. 4039, 4048 (December 5, 1972), for discussion of classifications based on speech. *See also* Speiser v. Randall, 357 U.S. 513 (1958), a case which although decided on procedural due process grounds discussed the effect of tax exemptions:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

Id. at 518.

tion of whether the government has exercised its taxing powers in such a discriminatory fashion as to violate the due process guaranties of the fifth amendment. This is neither a frivolous challenge nor one which, as of the writing of this opinion, has been foreclosed by the Supreme Court.

We want to stress that our opinion is in no way meant to state our views of the merits of this case beyond that required: namely, that the possibility of success is not so certain as to merit the *Enochs* exception with respect to § 7421(a), yet not so frivolous or foreclosed as to merit denial of the § 2282 motion. The discrimination problem may ultimately prove to be a mirage, or even a muddle, but it certainly is not maggot-pated. The question merits a three-judge panel.

Reversed and remanded for further proceedings consistent with this opinion.

WILKEY, *Circuit Judge*, concurring: I concur unreservedly in Judge Tamm's opinion for the court, all the more willingly because his opinion is a model of lucidity in a field of law—taxation—in which that quality is as rarely found in either judicial decisions or legislation as sunlight on the dark side of the moon.

Since we have decided no issue on the merits, except that the constitutional issues are sufficiently serious to require decision by a three-judge court, I believe it appropriate to raise a question for the consideration of the three-judge court which was not briefed by the parties and is not dealt with by our court's opinion.

As I see it, the basis of our decision here is that there is a substantial constitutional question because the challenged tax provision discriminates on the basis of wealth (size), and because the Supreme Court is currently considering cases which may say that such distinctions need to be closely analyzed. Although other statutes are relevant, the vital statute at issue is 26 U.S.C. § 501(c)(3) (1970), quoted in footnote one of the court's opinion. Making a careful analysis of this statute, the first part

states why tax exemption is granted—and that relates to the *purpose* of the organization. Thereafter are listed several factors which will nullify the tax-exempt status granted by the first part of § 501(c)(3). One of the *disqualifications* for tax-exempt status is expressed in the phrase, ". . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, . . ."

And this disqualification phrase is what this case is all about. 26 U.S.C. § 501(c)(3) *first* ties tax status to the *purpose* of the organization—and the "no substantial . . . influence legislation" disqualification test (like the disqualification reference to private earnings or political campaigns) *is aimed at assuring some purity in that purpose.*

It is arguable that a small organization that spends almost all of its funds lobbying is not organized or conducted for the same purpose as a large organization, which may spend quantitatively as much, but which proportionately devotes most of its activities to unquestionably exempt purposes. If we make an analysis by following the impact of the donor's dollar, a gift to "Americans United" has "more punch" on the legislative front than a gift to a large church organization which spends only 1% of its income on lobbying activities.

In that sense, the large organization is not engaged in what can reasonably be called "identical conduct." The statute does not give any greater privilege of speech to large organizations—other than the greater amount of impact any group can have if it raises more money. Rather, the interpretation of equal protection sought by "Americans United" would give a greater right of speech —by emasculating the "purpose" rationale of § 501(c)(3)—to small organizations. We cannot ignore the "purpose" rationale, because *purpose* is the *only* ground for tax exemption under § 501(c)(3).

Furthermore, if the larger groups are seen as engaged in "identical conduct"—what is to be the bench mark? If the purpose of the tax statute is to be preserved at all, then the large church organizations probably must hold to devoting a small percentage of their resources

to lobbying. Is that *quantitative* amount then to guide —so that a small organization, with total funds amounting only to the tiny percentage which the large organization devotes to this purpose, could devote 100% of its funds to lobbying and still be exempt?

In short, it is certainly arguable that small groups are not being treated differently by § 501(c)(3) because they are small, but because they are obviously operating for a different purpose if they devote their comparatively small funds on a much different proportionate basis to propaganda for legislation.

I have raised the issue above by stating only one side of the argument. There are, of course, counterarguments.[1] We are not here deciding this or any other issue on the merits, but since neither party has seen fit to bring this issue to the courts' attention, I feel it of sufficient importance to raise it for such consideration as the three-judge court and parties may wish to give it.

---

[1] Some counterarguments may be derived from William G. Halby's article, "Is the Income Tax Unconstitutionally Discriminatory?", 58 A.B.A.J. 1291 (December, 1972). Others may be inspired by the reflection that, if 200 years ago man revolted on the principle that "Taxation without representation is tyranny", then today men may rise in righteous wrath because taxation with representation but beyond human comprehension is even worse.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

Civil Action 2269-70

No. 71-1299

[Filed Jan. 11, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline Clerk]

"AMERICANS UNITED" INC., ET AL., APPELLANTS

v.

JOHNNIE M. WALTERS,
Commissioner of Internal Revenue

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: Fahy, Senior Circuit Judge, Tamm and Wilkey, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Opinion by Circuit Judge Tamm.
Concurring opinion by Circuit Judge Wilkey
Dated: January 11, 1973

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

Civil Action 2269-70

No. 71-1299

[Filed Apr. 30, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

"AMERICANS UNITED" INC., ET AL., APPELLANTS

v.

JOHNNIE M. WALTERS,
Commissioner of Internal Revenue

Before: Fahy, Senior Circuit Judge, Tamm and Wilkey, Circuit Judges

ORDER

It is ORDERED *sua sponte* by the Court that the opinion of January 11, 1973 is amended as follows:

Page 18, line 5 will now read:

burden upon the non-taxpayer, *e.g.*, where the valuation of an

Page 22, line 17 will now read:

1939." *Id.* at 501. The Court, per Justice Harlan,

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

SUPREME COURT OF THE UNITED STATES

No. 72-1371

JOHNNIE M. WALTERS,
Commissioner of Internal Revenue, PETITIONER

v.

"AMERICANS UNITED" INC., ET AL.

ORDER ALLOWING CERTIORARI—Filed June 4, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 506569 704